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May 25, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Docket No. 96-98

Dear Ms. Salas:

Enclosed for filing with the Commission, please find an original and twelve (12) copies of the Comments of the Joint Consumer Advocates regarding unbundled network elements.

I have enclosed an additional copy of this document which I request that you date stamp and return to me in the enclosed stamped and addressed envelope.

Should you have any questions regarding the submission please do not hesitate to contact me.

Very truly yours,

A handwritten signature in cursive script that reads "Theresa V. Czarski".

Theresa V. Czarski
Assistant People's Counsel
On behalf of the Joint Consumer Advocates

TVC:sd

cc: Ms. Janice M. Myles
ITS

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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MAY 26 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

IMPLEMENTATION OF THE LOCAL
COMPETITION PROVISIONS OF THE
TELECOMMUNICATIONS ACT OF 1996

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CC DOCKET NO. 96-98

**COMMENTS OF THE JOINT CONSUMER ADVOCATES REGARDING
UNBUNDLED NETWORK ELEMENTS**

I. Introduction

In response to the decision of the Supreme Court in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. ____, 119 S. Ct. 721, 142 L.Ed 2d 835 (1999), the Federal Communications Commission (FCC or Commission) has issued a Second Further Notice of Proposed Rulemaking seeking comment on issues related to how the Commission should identify the network elements that incumbent local exchange carriers must make available to requesting carriers pursuant to sections 251(c)(3) and 251(d)(2) of the Telecommunications Act of 1996. The purpose of these comments by the Joint Consumer Advocates¹ is to respond to the Commission's Notice of Proposed Rule making. The Joint Consumer Advocates are mandated by the laws of their respective states to represent the interests of consumers of telecommunications services in those states.²

¹ The Joint Consumer Advocates include the Pennsylvania Office of Consumer Advocate, the Ohio Consumers' Counsel, the Maryland Office of People's Counsel and the Connecticut Office of Consumer Counsel.

² The Maryland Office of People's Counsel is mandated by law to represent the interests of residential and non-consumer users of telecommunications services in the State of Maryland. See Md. Code Ann.

II. Summary

The Joint Consumer Advocates file these comments for two specific reasons. First, Joint Consumer Advocates request that the Commission move forward quickly to require that unbundled network elements are accessible to requesting parties on a reasonable basis. Access to unbundled network elements is necessary to promote local competition, particularly in more rural areas or to consumers who use a lower volume of services. Second, Joint Consumer Advocates request that the Commission do nothing to impair state authority to impose additional unbundling requirements on incumbent local exchange companies.

III. Access To Unbundled Network Elements On A Reasonable Basis Is Critical To Achieve Local Competition.

The purpose of the Telecommunications Act of 1996 was to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid

P.U.C. Section 2-204. Pursuant to state law, the Office of People’s Counsel may appear before any federal unit (including the Federal Communications Commission) to protect the interest of any residential and non-commercial users. Md. Code Ann. Section 2-205(b).

The Pennsylvania Office of Consumer Advocate is “empowered to represent the interests of consumers before the Pennsylvania Public Utility Commission, federal agencies and state and federal courts, pursuant to Act 1976-161 of the General Assembly, as amended, 71 Pa. Stat. Ann. §§309-1, *et seq.* (Purdon’s Supp. 1990).

The Ohio Consumer’s Counsel (OCC) is the statutory representative of Ohio’s residential consumers in matters involving Ohio’s public utilities. See O.R.C. Chapter 4911.

The Connecticut Office of Consumer Counsel “is authorized to appear in and participate in any regulatory or judicial proceedings, federal or state, in which such interests of Connecticut consumers may be involved, or in which matters affecting utility services rendered or to be rendered in this state may be involved.” Connecticut General Statutes §16-2(a).

deployment of new telecommunications technologies.”³ The Act required incumbent local exchange carriers (ILECs) to allow new entrants access to their networks in a variety of ways, including providing competitors with access to individual elements of the network on an unbundled basis. 47 U.S.C.A §251 (c)(2)(1997). As the Commission notes in its synopsis of the Second Further Notice of Proposed Rulemaking, on January 25, 1999, the United States Supreme Court upheld all but one of the Commission’s local competition rules that had been challenged before the United States Court of Appeals for the 8th Circuit. The Supreme Court rejected the Commission’s implementation of the network element unbundling obligations set forth in section 251(c)(3) of the Telecommunications Act of 1996,⁴ deciding that the Commission had not adequately considered the “necessary” and “impair” standards of the Act. The Federal Communications Commission now seeks to “refresh the record” regarding how the Commission should interpret the standard for unbundled network elements in order to achieve the goal of promoting rapid competition in the local telecommunications market.

Joint Consumer Advocates urge the Commission to give the broadest reading possible to the definitions of “necessary” and “impair.” Various incumbent local exchange companies have been seeking to avoid providing unbundled network elements to competitive local exchange carriers (CLECs) on the ground that they must wait until the FCC determines on remand what the scope of the “necessary” standard is. From the

³ Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat 56, 56 (1996).

⁴ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Proposed Rule, Fed. Reg., Vol. 64, No. 79, 20238 (April 26, 1999).

perspective of the average residential telecommunications consumer, the pace of competition in a local market has been virtually nonexistent; therefore, it is important that the FCC not unduly delay its decision in this matter. Access to unbundled network elements expeditiously is necessary to increase the pace of local competition. While local residential competition has been slow to develop even in densely populated urban areas, it has been nonexistent in rural areas where density is less and costs are higher. While the FCC should take into account the effect on competition for all consumers, access to unbundled network elements for those CLECS seeking to serve rural areas is even more pressing.

As a practical matter, the definition of “necessary” must be broad. What may be necessary or essential to one company to provide local service may not be necessary to another company. Factors such as whether the CLEC owns its own switching facilities may determine whether a proposed unbundled element is more or less necessary for that company. Additionally, geographic differences may determine the need for one form of competitive entry over another. Joint Consumer Advocates believe that it will be difficult to develop a “one size fits all” definition of “necessary.”

Joint Consumer Advocates recommend that the Commission re-adopt its existing list of seven minimum network elements which must be provided on an unbundled basis. Because a nationwide one- size- fits- all approach may not be practical, Joint Consumer Advocates recommend that the Commission consider a procedure whereby a requesting party requests by affidavit that it needs a particular element or elements of the incumbent LEC’s system. The requesting CLEC affidavit should be presumed to meet the

“necessary and impair” standard because it stands to reason that most companies will request only what they need for economic reasons. Should the ILEC disagree with the determination that a particular element is necessary, the burden of proof should shift to the ILEC to combat this presumption. The Commission should presume that a requesting CLEC will have sought out the most efficient, least costly method with which to provide local telecommunications service. If the ILEC happens to disagree with this determination, then it bears the burden of proof of showing alternative methods for obtaining the requested element which would not impair the ability of the CLEC to provide service. This procedure could be applicable at either the state or federal level.

IV. The FCC Should Not Impose Undue Restriction On State Authority to Establish Unbundled Network Elements

As noted above, the Joint Consumer Advocates continue to support minimum national standards for unbundling. In its Second Further Notice of Proposed Rulemaking, the FCC notes that if it were to continue to identify a minimum set of network elements that must be unbundled on a nationwide basis it would not limit the states’ authority to impose additional unbundling requirements. See Proposed Rule, para.

14. Joint Consumer Advocates believe the Proposed Rule thus recognizes the explicit provisions of Sections 261(b) and 261(c) of the Act which provide respectively that:

nothing in this part should be construed to prohibit any State Commission from enforcing regulations prescribed prior to the date of the enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the

requirement of this part, if such regulations are not
inconsistent with the provisions of this part⁵
and

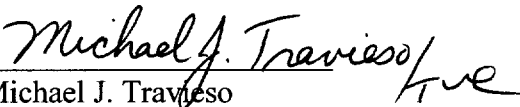
nothing in this part precludes a State from imposing
requirements on a telecommunications carrier for intrastate
services that are necessary to further competition in the
provision of the telephone exchange service or exchange
access, as long as the State's requirements are not
inconsistent with the provisions of this part or the
Commissions regulations to implement this part.⁶

The Joint Consumer Advocates continue to urge the Commission to support this
interpretation of the statute which would allow States to retain the authority to place
additional unbundling requirements on incumbent local exchange carriers depending
upon individual State circumstances.

IV. Conclusion

WHEREFORE, the Joint Consumer Advocates respectfully request that the
Federal Communications Commission adopt the foregoing recommendations.

Respectfully submitted,


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⁵ 47U.S.C. Section 261(b).

⁶ 47 U.S.C. Section 261(c).

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